

UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
OFFICE OF PROFESSIONAL RESPONSIBILITY  
WASHINGTON, D.C.

DIRECTOR, OFFICE OF  
PROFESSIONAL RESPONSIBILITY

Complainant,

v.

Complaint No. 2008-09

ELBERT L. SUTTON,

Respondent.

**DECISION ON MOTION FOR DEFAULT JUDGMENT**

On February 26, 2009, a Complaint was issued on behalf of the Director, Office of Professional Responsibility (OPR), Internal Revenue Service, pursuant to 31 C.F.R. §§10.50, 10.51, 10.60 and 10.62<sup>1</sup>, issued under the authority of 31 U.S.C. §330, alleging that Respondent Elbert L. Sutton, a certified public accountant engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. §10.2(d), engaged in disreputable conduct within the meaning of 31 C.F.R. §10.51 and is subject to suspension or disbarment from such practice. Specifically, it is alleged that the Respondent willfully failed to timely file a Federal income tax return for tax years 2001, 2002, 2003 and 2004 in violation of 26 U.S.C. §§6011, 6012 and 6072.

Pursuant to 31 C.F.R. §10.62, Respondent's Answer to the complaint was due within thirty (30) calendar days from the date of the service of the complaint. The Respondent did not file an Answer to the complaint.

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<sup>1</sup> The regulations governing the practice before the IRS, found at 31 C.F.R. Part 10, were most recently revised on September 26, 2007. The savings clause contained at 31 C.F.R. §10.91 of the revised regulations provides that any proceeding under this part based on conduct engaged in prior to September 26, 2007, which is instituted after that date, shall apply the procedural rules of the revised regulations contained in Subpart D (Rules Applicable to Disciplinary Proceedings) and E (General Provisions). However, "...conduct engaged in prior to September 26, 2007, shall be judged by the regulations in effect at the time the conduct occurred." 31 C.F.R. §10.91 (2007)

On May 12, 2009, the Area Counsel for the Office of Chief Counsel filed a Complainant's Motion for Default Judgment, moving that the Administrative Law Judge grant the relief requested in the complaint and specifically order that the Respondent be suspended from further practice before the Internal Revenue Service (IRS) for a period of not less than twenty-four (24) months pursuant to the provisions of 31 C.F.R. §10.50 and §10.70, issued under the authority of 31 U.S.C. §330, reinstatement thereafter being at the sole discretion of the OPR. The motion is based on the Respondent's failure to file an Answer to the complaint. The regulations provide authority for a decision by default where the practitioner does not timely file an answer, despite his receipt of the complaint, notice of the requirement to answer, and the potential consequence of a default decision. 31 C.F.R. §10.64(d). Where the practitioner fails to file an answer to the complaint within the time prescribed, said failure constitutes a waiver of the right to a hearing and the allegations set forth in the complaint are deemed admitted. 31 C.F.R. §10.64(d). Where the practitioner fails to respond within 30 days of a motion for decision by default for failure to file a timely answer, the nonmoving party is deemed to not oppose the motion. §10.68(b).<sup>2</sup>

Having carefully reviewed the pleadings before me, and noting that the Respondent did not file a timely Answer to the Complainant, I find that the admissions resulting from that failure leave no material issues of fact to be resolved and that a decision on the motion for default judgment is the appropriate way to dispense of this matter. The uncontested facts establish the following:

### **FINDINGS OF FACT**

1. The Respondent has engaged in practice before the Internal Revenue Service, as defined in 31 C.F.R. §10.2(d), as a Certified Public Accountant.
2. The Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility in accordance with 31 C.F.R. §10.50.

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<sup>2</sup> Although the Certified Mail No. 1 was set forth on the Certificate of Service attached to the Motion for Default Judgment, no signature was affixed to the Certificate and it indicated that the documents were served on April 30, 2009. However, a cover letter dated May 12, 2009, and affixed to the Motion indicated that service was made by certified mail on that date and it was signed. Nonetheless, the assumption of non-opposition to the motion will not be applied and this Order is based upon the Respondent's failure to file an Answer to the complaint and the presumption of admission to the allegations set forth in the complaint as authorized by the regulations.

3. The Respondent's last known address of record with the Internal Revenue Service is Address 1.
4. At all times relevant to this complaint, the Respondent was involved in the presentation of matters to the Internal Revenue Service concerning matters relating to taxpayers, as defined by 31 C.F.R. §10.2(a)(4).
5. At all times relevant to the complaint, the Respondent was a responsible party for the timely filing of his Federal income tax as required by 26 U.S.C. §§6011, 6012 and 6072.
6. Pursuant to 31 C.F.R. §§10.50 and 10.60, the Secretary of the Treasury, by his delegate, here the Office of Professional Responsibility of the IRS, may take a disciplinary action against any practitioner who is shown, *inter alia*, to be disreputable, or who fails to comply with any regulation in these parts.
7. The Respondent is subject to the regulations governing practice before the IRS by virtue of 31 C.F.R. §§10.0 *et. seq.*, and is subject to disbarment or suspension from practice before the Internal Revenue Service due to disreputable conduct.
8. The Respondent is subject to disbarment or suspension from practice before the IRS under 31 C.F.R. §§10.50 and 10.52, by reason of the fact that the Respondent has engaged in disreputable conduct, as set forth under 31 C.F.R. §10.51, the circumstances of the Respondent's conduct are more particularly set forth hereinafter.
9. In compliance with 31 C.F.R. §10.60(c), the Respondent previously has been advised in writing of the law, facts and conduct warranting the issuance of this complaint, and has been accorded an opportunity to dispute facts, assert additional facts and make arguments.
10. The Respondent was required by 26 U.S.C. §§6011, 6012 and 6072 to timely file Federal tax returns for:
  - a. tax year 2001
  - b. tax year 2002
  - c. tax year 2003
  - d. tax year 2004.

11. The Respondent failed to timely file a Federal tax return for:

- a. tax year 2001
- b. tax year 2002
- c. tax year 2003
- d. tax year 2004.

12. The Respondent's failure to timely file said tax returns was willful.

13. Such willful failure to timely file tax returns for tax years A through D constitutes disreputable conduct pursuant to 31 C.F.R. §10.51 generally, and more particularly, a willful violation of §10.51(d) (Rev. 1994) and §10.51(f) (Rev. 2002 and 2005), for which the Respondent may be censured, suspended or disbarred from practice before the Internal Revenue Service.

In conclusion, by failing to timely file an answer to the complaint filed by the Complainant, the Respondent has admitted that he willfully failed to timely file tax returns as alleged in the complaint and motion for default judgment.

As a certified public accountant who has engaged in practice before the Internal Revenue Service, the Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the OPR Director. Pursuant to 31 C.F.R. §10.50, the Respondent's eligibility to practice before the Internal Revenue Service is subject to suspension or disbarment by reason of engaging in disreputable conduct. Willfully failing to file a Federal tax return in violation of the revenue laws of the United States constitutes disreputable conduct within the meaning of 31 C.F.R. §10.51(d)(Rev. 1994) and §10.51(f)(Rev. 2002 and 2005). As a certified public accountant representing taxpayers before the Internal Revenue Service, the Respondent was aware of his responsibility to timely file tax returns. Therefore, I find that the Respondent's repeated willful failure to timely file tax returns constitutes disreputable conduct within the meaning of the regulations.

With regard to the remedy in this matter, the Complainant seeks to have the Respondent suspended from further practice before the Internal Revenue Service for a period not less than twenty-four (24) months because of his failure

to timely file his Federal income tax returns from tax year 2001 through 2004. The recommendation of OPR concerning the appropriate penalty is entitled to substantial deference and is consistent with the record before me, thus, I find that a suspension from practicing before the IRS for a period of not less than twenty-four (24) months an appropriate remedy.<sup>3</sup> The Respondent, a certified public accountant, was aware of his obligations to timely file his tax returns but willfully failed to fulfill those obligations. The allegations against the Respondent are serious in nature and it is important to deter similar conduct by other certified public accountants, thus, a suspension of not less than twenty-four (24) months is hereby ordered.

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<sup>3</sup> In its Motion for Default Judgment, the Complainant requests that reinstatement be at the sole discretion of OPR. The Complainant's motion with regard to reinstatement is also granted; specifically, that the Respondent may not be permitted to file a petition for reinstatement with OPR sooner than 10 days prior to the expiration of twenty-four (24) months following his suspension, and that OPR will only entertain his petition provided that the Respondent provide proof that:

- a. He has filed all Federal tax returns that were required to have been previously filed, and that he has paid, or has arranged with the IRS to pay, any outstanding Federal tax liabilities now due and owing;
- b. During the term of his suspension, he timely filed any Federal returns and paid or arranged with the IRS to pay, any Federal tax liabilities that become due and owing;
- c. During the term of his suspension, he did not engage in practice before the IRS or make any attempt to do so;
- d. During the term of his suspension, OPR did not contact him concerning any alleged violations of Circular No. 230;
- e. At the time he submits his petition, he is otherwise in compliance with Circular No. 230; and
- f. If his petition were granted, he will be eligible, as defined in Circular No. 230, to practice before the IRS as a certified public accountant.

## **ORDER**

The Respondent, Elbert L. Sutton, is hereby suspended from practice before the Internal Revenue Service for a period of not less than twenty-four (24) months.<sup>4</sup>

Dated at Washington, D.C., June 30, 2009.

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Charles R. Center  
Chief Administrative Law Judge

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<sup>4</sup> Pursuant to 31 C.F.R. §10.77, either party may appeal this Decision to the Secretary of the Treasury within thirty (30) days from the date of issuance.